BEFORE THE
PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Services and Facilities of Southern California Edison Company and San Diego Gas and Electric Company Associated with the San Onofre Nuclear Generating Station Units 2 and 3	)	I.12-10-013 (Filed October 25, 2012)
And Related Matters.	)	A.13-01-016 A.13-03-005 A.13-03-013 A.13-03-014

ALLIANCE FOR NUCLEAR RESPONSIBILITY'S AMENDED MOTION FOR SANCTIONS

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I. INTRODUCTION.

Pursuant to Rule 11.1 of the California Public Utilities Commission *("Commission" or* "CPUC") Rules of Practice and Procedure, and the April 14, 2015 Administrative Law Judges' Ruling,[1] the Alliance for Nuclear Responsibility ("A4NR") respectfully submits this Amended Motion for Sanctions against Southern California Edison Company ("SCE") for two violations of Rule 1.1, 72 violations of Rule 8.4, and a single violation of Cal. Pub. Util. Code §2114. As indicated in its original February 10, 2015 Motion, A4NR recommends sanctions "*consistent with D.14-11-041"*[2] although this Amended Motion for Sanctions asks the Commission to tailor D.14-11-041's application of Cal. Pub. Util. Code §2108 to the different type of injuries caused by SCE's non-disclosures in the consolidated I.12-10-013 proceeding.

The April 14, 2015 Administrative Law Judges' Ruling directed responses from SCE only to a limited subset of the information sought by A4NR's February 10, 2015 Motion,[3] and A4NR accordingly confines this Amended Motion for Sanctions to that limited subset. In light of the large number of reporting violations which SCE's April 29, 2015 Response reveals, and SCE's continued embrace of a fanciful construction of the statutes and Commission Rules governing ex parte communications in ratesetting proceedings, it is reasonable to infer that additional unreported ex parte communications would have been discovered had the full scope of A4NR's February 10, 2015 request been granted. Even within the narrower scope of the April 14, 2015

[1] The April 14, 2015 Ruling specifically authorized A4NR, within five business days of SCE's April 29, 2015 Response to the Ruling, to *"file an amended Motion for Sanctions to respond to, or include, any new information which may be provided by SCE."* April 14, 2015 Ruling, p. 6, ¶2.
[2] A4NR February 10, 2015 Motion, p. 10.
[3] The April 14, 2015 Ruling ordered documents pertaining to communications *"about potential settlement of the SONGS OII"* between March 1, 2013 and November 31, 2014 [sic], whereas A4NR's Motion sought similar documents *"since the January 31, 2012 SONGS tube leak concerning the subject matter of the I.12-10-013 investigation."* April, 14, 2015 Ruling, p. 5, ¶1, and A4NR February 10, 2015 Motion, p. 9, respectively.

Ruling, SCE's privilege log reveals a more promiscuous claim of attorney-client communication and attorney work product than California law permits.[4]

Inexplicably, despite an elaborate description of the computer search methodology and hard copy review which SCE utilized to winnow 2.06 million documents,[5] the company appears to have omitted the logically conclusive step from its inquiry. After its *"Level 2"*[6] review results had been purged of on-the-record and privileged communications, and its selected *"hard copy"*[7] and *"targeted"*[8] reviews completed, why weren't the individuals identified in Appendix A[9] asked to certify that they knew of no other documents responsive to the April 14, 2015 Administrative Law Judges' Ruling? A seemingly simple way to button up an otherwise loose end to the extensive search process appears to have been neglected.

If the Commission finds that SCE has violated Rule 1.1 and the various requirements governing ex parte communications in this ratesetting proceeding, framing an appropriate remedy may be inextricably entwined with the Commission's decision regarding A4NR's April 27, 2015 Petition for Modification of D.14-11-040 ("PFM"). A4NR's PFM argues that SCE's failure to make timely proper disclosure of its March 26, 2013 oral and written ex parte communications with then-President Peevey were violations of Rule 8.3(c), Rule 8.4, and Cal. Pub. Util. Code §1701.3(c), and that such violations constituted an extrinsic fraud on the I.12-

[4] The Commission should direct SCE to provide better foundation for the nexus between specific individuals from whom SCE received legal (as opposed to business, political, or public relations) advice and, at a minimum, Rpt#1, Rpt#2, Rpt#3, Rpt#7, Rpt#8, Rpt#9, Rpt#11, Rpt#26, and Rpt#48 as described in Appendix E to SCE's April 29, 2015 Response.
[5] SCE April 29, 2015 Response, Appendix A.
[6] *Id.,* ¶¶ 6b, 7, and 8.
[7] *Id.,* ¶9.
[8] *Id.,* ¶¶ 10 and 11.
[9] *Id.,* ¶¶ 1, 9, 10, and 11.

10-013 parties and fraud-by-concealment on the settling parties. The ongoing damage to the parties from each succeeding day of non-disclosure while the I.12-10-013 proceeding was under way, as explained more fully in the PFM, strongly suggests that SCE's non-disclosure – as distinguished from the March 26, 2013 communication itself – was a continuing offense pursuant to Cal. Pub. Util. Code §2108. Aside from the $38.2 million fine/penalty and one-year restriction on ex parte communications suggested herein, the Commission should coordinate any ratemaking remedy which results from this Amended Motion for Sanctions with its decision on the PFM.

II. SCE's RESPONSE PERSISTS IN MISCONSTRUING THE RESTRICTIONS ON EX PARTE COMMUNICATIONS IN RATESETTING PROCEEDINGS.

Despite describing what A4NR conservatively estimates to be at least 72 reportable ex parte communications,[10] SCE's Response appears to adhere to the distortion of Article 8 of the Commission's Rules and non-acknowledgement of Cal. Pub. Util. Code §1701.3(c) that dominated its February 25, 2015 Response to A4NR's original February 10, 2015 Motion. There is simply no other way to interpret the April 29, 2015 Response's assertion: *"SCE does not believe that there were any reportable ex parte communications."*[11] Rather than repeat the debunking arguments contained in A4NR's March 9, 2015 Reply, A4NR will incorporate them herein by reference and focus on the new rationales for non-reporting offered in SCE's April 29, 2015 Response:

[10] As indicated in Section IV below, the SCE documents identify four to six additional ex parte communications that were not included in the Response's Appendix C descriptions.
[11] SCE April 29, 2015 Response to Administrative Law Judges' Ruling, p. 22.

A. "Rule 8.4 is ambiguous and requires interpretation."[12]

SCE's April 29, 2015 Response offers no explanation for where it finds ambiguity in Rule 8.4's seemingly straight-forward reporting requirements, but it echoes Edison International CEO Ted Craver's perfervid lament the previous day in his quarterly earnings teleconference with financial analysts:

> *This effort has also highlighted for me the need to have Rule 8.4, which covers ex parte notices, reviewed and clarified. Any rule can't possibly cover every conceivable communication circumstance, which creates a need to interpret that rule.*
>
> *Over time, the parties who regularly practice before the CPUC, commissioners, utilities and interveners alike, and resulting commission decisions, develop a body of accepted practice concerning that rule. We make every effort to comply with Rule 8.4 on ex parte notices.*
>
> *In my opinion, Rule 8.4 could certainly stand to be clarified and updated.* ***We are the ones who bear the reputational and financial risk*** *of interpretations of, and after the fact judgments regarding, an ambiguous rule. We understand President Picker intends to review Rule 8.4. We very much welcome such an effort.*[13]

A4NR suspects that Commission members and staff might differ with Mr. Craver over the distribution to date of reputational and financial risk stemming from the ex parte communications scandal engulfing the Commission. Nor should the purported ambiguity in the requirements generate much agreement or sympathy. As the Commission observed in D.14-11-041: *"The ex parte rules are not complicated, and neither are the ethical considerations of*

[12] *Id.,* p. 23.
[13] Seeking Alpha Transcript, April 28, 2015, p. 2, accessible at http://seekingalpha.com/article/3113436-edisons-eix-ceo-theodore-craver-on-q1-2015-results-earnings-call-transcript?page=1

due process, transparency and level playing field in government, and the obligation to avoid breaking the law."[14]

And Cal. Pub. Util. Code §1701.3(c) seems to possess an unmistakable clarity in the limitations it places on ex parte communications in ratesetting cases like I.12-10-013:

> *Ex parte communications are prohibited in ratesetting cases. However, oral ex parte communications may be permitted at any time by any commissioner if all interested parties are invited and given not less than three days' notice. Written ex parte communications may be permitted by any party provided that copies of the communication are transmitted to all parties on the same day. If an ex parte communication meeting is granted to any party, all other parties shall also be granted individual ex parte meetings of a substantially equal period of time and shall be sent a notice of that authorization at the time that the request is granted. In no event shall that notice be less than three days...*

B. The communications were "one-way communications from CPUC decision-makers to SCE."[15]

To avoid admitting its prior non-compliance with Rule 8.4, SCE's Response submits Appendix C "*(i)n the interest of transparency"*[16] to describe a lengthy compilation of ex parte communications[17] and then identifies two blanket justifications for not filing Notices earlier or even in response to the April 14, 2015 Administrative Law Judges' Ruling. The first blanket is subdivided between one-way communications and procedural communications. Although Appendix C fails to specifically identify which of its 33 enumerated paragraphs would fall into

[14] D.14-11-041, p. 20.
[15] SCE April 29, 2015 Response to Administrative Law Judges' Ruling, p. 22.
[16] *Id.*
[17] The April 14, 2015 Ruling ordered SCE in ¶3 to "*promptly file notices of any undisclosed communication identified in Question 1 above ..."* Question 1 specified *"all documents pertaining to oral and written communications about potential settlement of the SONGS OII between any SCE employee and CPUC decisionmaker(s) ... which reported, discussed, referred to, or otherwise contained a description of such communications."*

the *"one-way"* category, the actual communications contained in Appendix D and the declarations contained in Appendices F and G suggest that this term may be interchangeable with "*listen mode"* and *"listen-only mode."*

Neither the statute nor Article 8 of the Commission Rules contain any of these terms – "*one-way"*, "*listen mode",* or *"listen-only mode"* -- but the logical implication is that the SCE individual was completely mute and that no oral or written communication emanated from said SCE individual. As identified in the specific communications discussed below, however, that appears to have never been the case with any of the Appendices D, F and G communications where such descriptors are used.

C. The communications were "procedural questions about settlement."[18]

Cal. Pub. Util. Code §1701.1(c)(4) excludes communications concerning "*procedural issues"* from its definition of ex parte communication.[19] Commission Rule 8.1(c) clarifies that communications regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other such nonsubstantive information are procedural inquiries, not ex parte communications. Neither the statute nor Article 8 of the Commission Rules addresses "*procedural questions about settlement."* Although the Commission is not subject to the Administrative Procedure Act, the concerns for procedural due process at the Commission arguably parallel those that motivated the permission of procedural communications in Cal

[18] SCE April 29, 2015 Response to Administrative Law Judges' Ruling, p. 22.

[19] Cal. Pub. Util. Code §1701.1(c)(4): *" 'Ex parte communication,' for purposes of this article, means any oral or written communication between a decisionmaker and a person with an interest in a matter before the commission concerning substantive, but not procedural issues, that does not occur in a public hearing, workshop, or other public proceeding, or on the official record of the proceeding on the matter."*

Gov. Code §11430.20(b). The Official Comments from the California Law Revision Commission are instructive:

> *This article is not intended to preclude communications made to a presiding officer or staff assistant regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, manner of service, and calendaring and status discussions. Subdivision (b). Such topics are not part of the merits of the matter, provided they appear to be noncontroversial in context of the specific case.*[20]

SCE's Response does not provide any indication of which of the communications identified in Appendix C fall into this *"procedural"* category. A4NR's review indicates that only those described in ¶¶ 20, 21, 22, and possibly 32 qualify as appropriately *"procedural"* in nature. Notably, three of the four are communications with the ALJs. As D.14-11-041 notes,

> *In any event, to the extent that procedural communications are nonsubstantive, there is no cause to direct them to Commissioners or their advisors; the Commission's Administrative Law Judges are best suited to address them and are trained and experienced in fielding procedural requests and adept at discerning when they rise to the level of ex parte communications that require notice and reporting.*[21]

D. "substantive (not procedural) communications ... pertaining to operational, reliability, and similar issues related to the SONGS outages that SCE believes were not within the scope of the OII."[22]

The second blanket justification SCE asserts for not filing Notices earlier or in response to the April 14, 2015 Administrative Law Judges' Ruling collides with the expansive subject

[20] California Law Revision Commission Recommendation, January 1995, p. 165.
[21] D.14-11-041, p. 24.
[22] SCE April 29, 2015 Response to Administrative Law Judges' Ruling, p. 22.

matter identified in the Preliminary Scoping Memo, which the Commission included in its October 25, 2012 adoption of the Order instituting I.12.10.013:

> *The general scope of this OII is to review the effect on safe and reliable service at just and reasonable rates on and after January 1, 2012 of the outages at SONGS Units 2 and 3. The issues include:*
>
> *1. Whether or not rate adjustments should be made; if so, when they should start, the correct amount, and the correct accounting of these adjustments.*
>
> *2. The reasonableness and prudency of each utility action and expenditure with respect to the steam generator replacement program and subsequent activities related thereto.*
>
> *3. The reasonableness and prudency of each utility action and expenditures in securing energy, capacity and other related services to replace the output of SONGS during the outage.*
>
> *4. The cost-effectiveness of various options for repairing or replacing one or both units of SONGS.*
>
> *5. Any additional ratemaking issues associated with the above, including the availability of warranty coverage or insurance for any costs related to the SONGS outage.*
>
> *6. The reasonableness and necessity of each SONGS-related operation and maintenance expense, and capital expenditure made, on and after January 1, 2012 reviewed within the context of the facts and circumstances of the extended outages of Units 2 and 3.*[23]

As with both sub-categories of its first blanket justification, SCE's Response makes no effort to identify which of the communications identified in Appendix C involve "*issues related to the SONGS outages which SCE believes were not within the scope of the OII."*[24] Reviewing Appendix C against the metric of the OII's Preliminary Scoping Memo, A4NR finds that none of the identified communications can meet this qualification.

[23] OII, pp. 14 – 15.
[24] SCE April 29, 2015 Response to Administrative Law Judges' Ruling, p. 22.

III. A4NR COUNTS AT LEAST 71[25] ADDITIONAL EX PARTE COMMUNICATIONS THAT WERE REQUIRED TO BE REPORTED IN FILED/SERVED NOTICES.

Based solely on the descriptions of communications in Appendix C to SCE's Response, A4NR tallies the following ex parte communications for which Rule 8.4, as well as the April 14, 2015 Administrative Law Judges' Ruling, required SCE to provide notice to the I.12-10-013 parties:

¶1	1	¶12	5	¶23	2
¶2	1	¶13	1	¶24	3
¶3	1	¶14	1	¶25	2
¶4	1	¶15	5	¶26	1
¶5	6	¶16	1	¶27	1
¶6	5	¶17	2	¶28	1
¶7	3	¶18	1	¶29	1
¶8	1	¶19	11	¶30	1
¶9	5	¶20	0	¶31	2
¶10	1	¶21	0	¶32	0
¶11	4	¶22	0	¶33	1

This tally sums to 71. The sheer number of violations, as well as the procedural unfairness to the other I.12-10-013 parties -- unilaterally deprived of the protections afforded them by Rule 8.3(c), as well as the information they were entitled to under Rule 8.4 -- should trigger exercise of the Commission's discretionary authority under Rule 8.3(j). In addition to

[25] The March 26, 2013 Pickett-Peevey ex parte communication is the only one for which SCE has filed a Notice.

considering the Rule 8.3(j) sanctions and penalties recommended in this Amended Motion for Sanctions, the Commission should also weigh its authority to *"make any other order, as it deems appropriate to ensure the integrity of the record and to protect the public interest."*

IV. APPENDIX D TO SCE's RESPONSE REVEALS 4 - 6 MORE UNREPORTED EX PARTE COMMUNICATIONS BETWEEN SCE AND CPUC DECISIONMAKERS.

A simple review of the contents of the documents SCE has provided in Appendix D to its Response makes clear that Appendix C is an incomplete compilation of SCE's unreported ex parte communications:

- the April 4, 2013 email from Stephen Pickett to Megan Scott-Kakures and Russell Worden states: *"I'm in San Francisco tomorrow for a meeting with Peevey on L.A. Basin reliability."*[26] Appendix C contains no description of any April 5, 2013 communication from Mr. Pickett.
- the April 11, 2013 email from Ronald Litzinger to Ted Craver, Robert Adler, and Jim Scilacci states: "*Steve has yet another 'social dinner' with President Peevey this weekend??"*[27] Appendix C contains no description of any communications between April 6, 2013 and May 16, 2013.
- the April 11, 2013 email from Ronald Litzinger to Ted Craver, Robert Adler, and Jim Scilacci also states: *"I pressed Steve as to whether his two previous meeting* [sic] *were listen only given we have heard whispers of leaks from the CPUC of significant SCE presence on the*

[26] SCE April 29, 2015 Response to Administrative Law Judges' Ruling, Appendix D, p. SCE-CPUC-00000005.
[27] *Id.,* p. SCE-CPUC-00000186.

issue."[28] Appendix C does not describe any communications whatsoever from *"Steve",* who A4NR presumes to be Mr. Pickett.

- the May 29, 2013 email from Michael Hoover to Les Starck begins, "*In talking with Carol, she indicated that Pickett was well prepared in Poland with specifics, but then nothing has happened."*[29] Appendix C contains no mention of any communication between Mr. Hoover and *"Carol",* who A4NR presumes to be Carol Brown, between March 23, 2013 (Mr. Pickett's late-noticed ex parte communication with President Peevey took place on March 26, 2013) and on or about June 7, 2013.
- The May 29, 2013 email from Les Starck to Michael Hoover states: *"We need to talk with Pickett ASAP to let him know about your discussion with Peevey."*[30] This appears to be a response to an earlier May 29, 2013 email from Mr. Hoover to Mr. Starck which states: "*Peevey was made aware of the letters last Thursday. He is really unhappy with the way we handled this."*[31] Appendix C does not describe any communications between Mr. Hoover and President Peevey prior to May 28, 2014.

By A4NR's count, there are at least four and potentially as many as six[32] unreported ex parte communications referred to in the documents included in Appendix D which were not included in the descriptions of communications contained in Appendix C.

[28] *Id.*
[29] *Id.,* p. SCE-CPUC-00000187.
[30] *Id.*
[31] *Id.*, p. SCE-CPUC-00000188.
[32] The difference stems from A4NR's uncertainty whether Mr. Litzinger's April 11, 2013 mention of two previous meetings between *"Steve"* and President Peevey refers to the previously noted Pickett-Peevey meetings of March 26, 2013 and April 4, 2013 or to other unreported meetings.

V. APPENDIX D SHOWS FOUR OF THE APPENDIX C DESCRIPTIONS OF SCE COMMUNICATIONS TO BE MATERIALLY MISLEADING.

Despite relying on a belabored misconstruction of Commission Rules, as discussed in Section II above, to avoid the ¶3 reporting directive of the April 14, 2015 ALJs' Ruling, SCE nevertheless submitted Appendix C "*(i)n the interest of transparency"* as a *"summary of communications between SCE and CPUC decision Makers from October 25, 2012 through November 30, 2014."*[33] Although containing the caveat, *"The following description is not a verbatim account of the conversations,"*[34] the Commission is nevertheless entitled to presume that SCE's Appendix C was prepared in good faith and is an accurate representation of the communications it purports to describe.

Four of the descriptions contained in Appendix C fall materially short of that standard, and should be reviewed from the perspective of what I.12-10-013 parties were legally entitled to know had the ex parte communications been properly reported:

1. **<u>June 5, 2013 call(s) from Ted Craver to President Peevey:</u>**

¶10 of Appendix C states: "*Ted Craver contacted President Peevey to notify him that SCE would be announcing its decision to permanently retire SONGS. There was no discussion of the substance of any settlement, though Mr. Craver stated that Robert Adlerwould* [sic] *oversee SCE's efforts to negotiate a settlement of the OII. The call lasted approximately 5 minutes or less."*[35]

[33] SCE April 29, 2015 Response to Administrative Law Judges' Ruling, p. 22.
[34] *Id.,* footnote 35.
[35] *Id.,* pp. 25 – 26.

The June 6, 2013 email from Ted Craver to *"brett.white ... dickschlosberg ... france ... jeetsbindra ... inogales ... peter.taylor ... ron.olson"*, with a copy to Robert Adler, describes the call differently:

> *President Peevey—actually two calls, as the first one was interrupted by the Governor's call. Constructive, positive. Glad to get this uncertainty over with and focused on their ratemaking OII. Said he was going out with a statement after our investor call; his statement will focus on 'urging the parties to meet and see if they could come up with a settlement to submit to the CPUC' and that he was going to convene a task force of sorts including the two utilities and various state agencies to work on insuring reliability. We talked about my call with the Governor, and I asked him to see if he could get the Governor to say something supportive about our handling of the situation and looking forward.*[36]

2. **<u>June 7, 2013 call from Mike Hoover to Sepideh Khosrowjah:</u>**

¶12 of Appendix C states: "*Sepideh Khosrowjah, Commissioner Florio's Advisor, stated to Mr. Hoover that SCE should move quickly to resolve cost recovery and shutdown issues."*[37]

The June 7, 2013 email from Michael Hoover to Catherine Hackney, Laura Genao, Connor J Flanigan, Les Starck, Gary Stern, Megan Scott-Kakures, Russell Worden, Caroline Choi, and Gary Schoonyan describes the call differently:

> *Sepideh of Florio's office was fairly forthright. She said we need to move quickly to address cost recovery and other shutdown issues going forward. We discussed how to do that in a manner that is inclusive of the parties and avoids the type of animosity toward the CPUC that has plagued the PG&E San Bruno proceeding. Ideas to consider are filing a motion for Alternative Dispute Resolution at the CPUC, outreach to the leaders of the key stakeholder groups involved in the Songs proceeding to initiate discussions quickly. We agreed that it would be best if SCE got out in front in terms of trying to put a process in place that would result in resolution of the issues in a manner that does not rely on protracted hearings etc. Delay only hurts everyone.*[38]

[36] *Id.,* Appendix D, p. SCE-CPUC-00000190.
[37] *Id.,* p. 26.
[38] *Id.,* Appendix D, pp. SCE-CPUC-00000191 – SCE-CPUC-00000192.

The June 7, 2013 email from Les Starck to Stephen Pickett, forwarding Mr. Hoover's email, also characterizes the Hoover-Khosrowjah call differently than the Appendix C description:

> *See Mike's note below about his discussions with Florio's chief of staff. They're encouraging us to get 'out front' early on settling this with the parties and to do everything we can to keep this out of the Commission's hands. They've learned much from the San Bruno effort (i.e., claims that the commission is in the 'pockets' of the utilities) and want to avoid a repeat as much as they can.*[39]

3. **<u>September 6, 2013 lunch meeting between Ron Litzinger, Les Starck, and President Peevey:</u>**

¶16 of Appendix C states:

> *At the lunch, President Peevey initiated a brief communication about SONGS and the Energy Resource Recovery Account ("ERRA") proceeding. With regard to SONGS, President Peevey remarked that the utilities would either recover their capital, or their replacement power cost, but not both. Mr. Litzinger was uncomfortable discussing SONGS and, as a means of deflecting the topic, Mr. Litzinger said that the outcome would be somewhere in between those extremes. Mr. Litzinger's remark was not more than a sentence or two. President Peevey then asked about the status of settlement negotiations, and Mr. Litzinger responded that the settlement negotiations were progressing. In response to President Peevey's statement that the ERRA proceeding would not be resolved until the SONGS OII was resolved, Mr. Starck stated that the CPUC should issue a decision in the ERRA docket, as delay was resulting in a rapidly growing undercollection.*[40]

The September 6, 2013 chain of internal SCE emails provided in Appendix D describes the interactions differently, beginning with an email from Stephen Pickett to Les Starck:

> *So?*
>
> *How did it go?*

[39] *Id.,* p. SCE-CPUC-00000191.
[40] *Id.,* p. 27.

I heard a blurb on NPR about the photo op, and I saw your note in the officer's memo. What happened with Peevey out there?

If you don't want to put it in an email, call me. I'm at home and you can reach me thru the Edison Op., or [Redacted][41]

Mr. Starck responded:

You beat me to it! Tried calling...your line's busy. Call me cell anytime at [Redacted]. *Meeting went well. Nice lunch with Peevey. Friendly and cordial. Mike says no ERRA until SONGS settled. He also said that the boundaries of any decision would be that we get all our capital and no replacement fuel, or none of our capital and all replacement fuel. Ron responded that it would be a combination of disallowances of the two...no reaction from Mike. Ron did say that he felt good about the progress of settlement discussions with multiple parties. Mike asked about timing...Ron couldn't say. I told Mike that no action by the Commission on ERRA is placing us in extremely difficult financial situation. Told him we're undercollecting $100 million each month...same situation as under the energy crisis. He was very surprised to hear the numbers are that large.*[42] (ellipses in original)

Thirteen minutes later, Mr. Starck forwarded his email to Michael Hoover, Thomas Burhenn, Laura Genao, and Gary Stern, with the notation: *"All, here's my quick note to Steve about today's meeting."*[43] This prompted a reply to Mr. Starck from Laura Genao eight minutes later: *"You should talk to Mike H. about the potential ex parte implication of today's conversation."*[44] Ms. Genao forwarded her email to Mr. Hoover three minutes later, who responded the next day: *"He should not put this in notes....."*[45] (ellipses in original) and added

[41] *Id.,* p. SCE-CPUC-00000201.
[42] *Id.*
[43] *Id.,* p. SCE-CPUC-00000202.
[44] *Id.,* p. SCE-CPUC-00000203.
[45] *Id.*

in a second email to Ms. Genao three minutes later, "*Mike is also playing with him. He's saying if its* [sic] *left up to them it will be harsh....*"[46] (ellipses in original)

4. **March 27, 2014 email from Ronald Litzinger to Liese Mosher:**

¶19 of Appendix C states:

> *On or about March 27, 2014, Ron Litzinger spoke briefly by telephone with, or left messages for, each of the Commissioners. Mr. Litzinger made the Commissioners aware that SCE had signed a proposed settlement agreement and directed them to SCE's publicly filed 8-K for details.*[47]

Mr. Litzinger's email to Liese Mosher on the afternoon of March 27, 2014 suggests that his telephone conversations with President Peevey and Commissioner Florio[48] may have entailed more than mere notification:

> *Liese – I have contacted the CPUC Commissioners* **Redacted – AC/WP**[49] *. President Peevey and Commissioner Florio were reached directly and those calls went well. I have left detailed messages for Commissioners Sandoval, Peterman, and Picker. I anticipate call backs later this evening or tomorrow.*[50]

VI. MR. PICKETT's DECLARATION DIGS A DEEPER HOLE.

Appendix F to SCE's April 29, 2015 Response, the April 28, 2015 Declaration of Stephen Pickett, fills in some notable voids in SCE's February 9, 2015 Late-Filed Notice of Ex Parte Communication and its April 13, 2015 Supplement. Despite the ostensible benefit of hindsight

[46] *Id.*
[47] *Id.,* p. 28.
[48] Based on his statement at the May 14, 2014 evidentiary hearing, Commissioner Florio had apparently already seen the 8-K before Mr. Litzinger's call: *"I had no part in formulating the settlement and was not aware of it until it was published online in the 8-K."* Transcript, p. 2783, lns. 16 – 18.
[49] Assertion of an attorney-client or attorney work product privilege in an email from Mr. Litzinger, who is not an SCE attorney, to an individual in SCE's Corporate Communications group should require greater justification. A4NR urges the Commission to direct SCE to provide better foundation of the nexus for the privileges claimed, as discussed in Footnote 4 above regarding documents identified in Appendix E to SCE's April 29, 2015 Response.
[50] SCE April 29, 2015 Response to Administrative Law Judges' Ruling, Appendix D, p. SCE-CPUC-00000209.

and the certain opportunity to harmonize with SCE's current version of events, Mr. Pickett's Declaration broadens and deepens the scale of SCE's actionable misconduct in I.12-10-013:

- ***"As of March 2013 and until my retirement, I was Executive Vice President of External Relations."***[51] He was no longer SCE's General Counsel and his job duties no longer included provision of legal advice. His communications and writings could no longer be covered by either the attorney-client or attorney work product privileges unless directly tied to someone who was providing such legal advice to SCE.
- ***"Prior to my departure to Poland, President Peevey asked SCE for a briefing about the status of its efforts to restart SONGS ..."***[52] Cal. Pub. Util. Code §1701.3(c) permits such meetings only "*if all interested parties are invited and given not less than three days' notice."* While Rule 8.3(c)(1) places the burden of making such an invitation on the Commissioner, and allows *"a conference call in which all parties may participate"* as an alternative, SCE had an obligation to refrain from participating in an unlawful meeting. Mr. Pickett's Declaration dispels any misimpression created by SCE's February 9, 2015 Late-Filed Notice that the Peevey request was made in Poland.
- ***"and SCE management assigned me the task of updating President Peevey on this issue at some point during the Poland trip."***[53] The Pickett-Peevey meeting was planned, not spontaneous. Despite subsequently insinuating loose-cannon or rogue-like qualities to Mr. Pickett,[54] SCE management provided advance authorization for his ex parte contact with

[51] *Id.,* Appendix F, ¶1.
[52] *Id.,* ¶3.
[53] *Id.*
[54] See SCE April 29, 2015 Response to Administrative Law Judges' Ruling, Appendix G, Declaration of Ronald L. Litzinger, and April 11, 2013 email from Mr. Litzinger to Ted Craver, Robert Adler, and Jim Scilacci: *"I met Steve face to face this morning and reinforced that there can be no discussions with the CPUC on settlement that is not*

President Peevey in Poland. Whether Mr. Pickett expected to discuss settlement; was authorized to settle; attempted to reach agreement; or did reach agreement, tentative or otherwise, is irrelevant to SCE's obligations under Article 8 of the Commission Rules.

- ***"I provided President Peevey with an update about the status of SCE's efforts to restart SONGS ..."***[55] SCE's failure to timely report this oral ex parte communication unfairly deprived the other I.12-10-013 from exercising their rights under Cal. Pub. Util. Code §1701.3 and Rule 8.3(c)(2) to a meeting with President Peevey of substantially equal time.
- ***"At some point, well into the meeting, I obtained a pad of paper from the hotel and began taking notes in an effort to organize President Peevey's comments for my own benefit ... At some point near the end of the meeting, President Peevey asked me to give him the notes ... President Peevey kept the notes after the meeting."***[56] Cal. Pub. Util. Code §1701.3 and Rule 8.3(c)(3) require same-day transmittal to all parties of copies of written ex parte communications, and Mr. Pickett's failure to do so severely prejudiced the other I.12-10-013 parties. Neither the statute nor Commission Rules contemplate failure to retain a copy as an acceptable excuse from performance. SCE compounded its misconduct by its subsequent failure to comply with the reporting requirements of Rule 8.4(c), which specify a three-working-day filing deadline and inclusion of any written material *"used for or during the communication."* SCE's behavior prevented the other I.12-10-013 parties from learning directly the content of the notes, from asking President Peevey for a copy of the notes, or

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sanctioned by us. There will only be one spokesperson appointed by us. I noted we are in listen mode only. Steve has yet another 'social dinner' with President Peevey this weekend?? ... I left meeting feeling uneasy. I am pondering another conversation clearly stating that unauthorized engagement would result in dismissal—but common sense would dictate that without saying it. Any thoughts would be appreciated." Id., Appendix D, p. SCE-CPUC-00000186.

[55] *Id.,* Appendix F, ¶5.

[56] *Id.,* ¶11.

from exercising their rights under the California Public Records Act to make a request to the Commission for a copy of the notes.

- ***"When I returned to the United States, I briefed senior executives on April 1, 2013, about what President Peevey had said to me ... At some point during the meeting, the issue was raised of whether my meeting with President Peevey constituted a reportable ex parte communication."***[57] Knowledge of Mr. Pickett's communications, as well as agreement on the chosen path of non-disclosure, was embraced at the highest management levels of both SCE and Edison International. A4NR believes that ¶¶ 3, 5, 6, 11, and 13 of Mr. Pickett's Declaration provide descriptions of reportable ex parte communications. Only an exaggerated credulity, in light of the widely publicized March 22, 2013 oral argument before the SONGS Atomic Safety and Licensing Board, would accept that ¶¶ 14 and 15 do not also conceal reportable ex parte communications.

VII. MR. LITZINGER TESTIFIED FALSELY.

Mr. Litzinger provided sworn testimony[58] at the Commission's May 14, 2014 evidentiary hearing on the proposed settlement. He was cross-examined by Michael Aguirre, counsel for Ruth Henricks, regarding ex parte communications by SCE with members of the Commission:

> *Q Now, while you were having those secret negotiations that some of the settling parties were not invited -- some of the opponents were not invited to participate, you also were having ex parte meetings with members of the Commission, true?*
>
> *MR. WEISSMANN: I object to the form of the question.*

[57] *Id.,* ¶16.
[58] Transcript, p. 2665, lns. 10 – 12.

ALJ DARLING: Why don't you just ask the last part, if that's what you want?

MR. AGUIRRE: Q Okay. Go ahead. Answer the last part of that what your Honor said.

WITNESS LITZINGER: A Whether I had ex parte meetings with the commissioners?

Q Was Southern California Edison having ex parte meetings with the commissioners while the secret negotiations were taking place?

A The only ex parte communications I had with commissioners was following the Phase 1 proposed decision. And it was noticed.[59]

Mr. Litzinger's answer was narrower than the question asked, but he did directly respond regarding his own ex parte communications. Indeed, the I.12-10-013 docket does contain a January 17, 2014 notice filed by SCE identifying Mr. Litzinger as a participant in the all-party ex parte meeting scheduled by Commissioner Sandoval that took place on January 15, 2014 at the Commission. But Mr. Litzinger's response to Mr. Aguirre overlooked the unreported ex parte communications, as discussed in Section III above, in which he engaged on January 14, 2013[60](one communication); March 22, 2013[61](four communications); March 25, 2013[62](one communication); May 16, 2013[63](three communications); May 17, 2013[64](one communication); June 7, 2013[65](four communications); June 26, 2013[66](one communication);

[59] Transcript, p. 2771, lns. 1 – 23.
[60] SCE April 29, 2015 Response to Administrative Law Judges' Ruling, Appendix C, ¶2.
[61] *Id.,* ¶5.
[62] *Id.*
[63] *Id.,* ¶7.
[64] *Id.,* ¶8.
[65] *Id.,* ¶11.
[66] *Id.,* ¶14.

August 9, 2013[67](five communications); September 6, 2013[68](one communication); March 27, 2014[69](six communications); May 2, 2014[70](two communications); May 7, 2014[71](three communications); and even May 14, 2014[72](two communications) immediately before the evidentiary hearing[73] at which he falsely testified.

Based on the documents turned over in SCE's April 29, 2015 Response, Mr. Litzinger's sworn testimony failed to acknowledge 34 unreported ex parte communications in which he had personally participated. The Commission is well aware of the provisions of Cal. Pub. Util. Code §2114:

> *Any public utility on whose behalf any agent or officer thereof who, having taken an oath that he will testify, declare, depose or certify truly before the commission, willfully and contrary to such oath states or submits as true any material matter which he knows to be false, or who testifies, declares, deposes, or certifies under penalty of perjury and willfully states as true any material matter which he knows to be false, is guilty of a felony and shall be punished by a fine not to exceed five hundred thousand dollars ($500,000).*

VIII. APPLYING D.14-11-041.

As indicated in its original February 10, 2015 Motion, A4NR recommends sanctions "*consistent with D.14-11-041."*[74] D.14-11-041 cited *"the Commission's established principles used in assessing sanctions"*[75] as set forth in D.98-12-075:

- *What harm was caused by virtue of the violation?*

[67] *Id.,* ¶15.
[68] *Id.,* ¶16.
[69] *Id*., ¶19.
[70] *Id*., ¶23.
[71] *Id*., ¶24.
[72] *Id*., ¶25.
[73] SCE April 29, 2015 Response to Administrative Law Judges' Ruling, Appendix G, ¶11.
[74] A4NR February 10, 2015 Motion, p. 10.
[75] D.14-11-041, p. 6.

- *What was the utility's conduct in preventing, detecting, correcting, disclosing, and rectifying the violation?*

- *What amount of fine or penalty will achieve the objective of deterrence based on the utility's financial resources?*

- *What fine/penalty or sanction has the Commission imposed under reasonably comparable factual circumstances? And,*

- *Under the totality of circumstances, and evaluating the harm from the perspective of the public interest, what is the appropriate fine/penalty or sanction?*[76]

SCE's violations of Article 8 of the Commission's Rules and Cal. Pub. Util. Code §§ 1701.3(c) and 2114 severely harmed the integrity of the regulatory process, and nullify any impression that I.12-10-013 was transparently conducted. SCE's unilateral decisions to ignore its legal obligations to timely report ex parte communications – especially the oral and written communications of Mr. Pickett in Poland – prevented the other I.12-10-013 parties from effectively participating in what they were entitled to believe was a level playing field governmental process. SCE's misconduct repeatedly involved the highest levels of company management, counseled by experienced attorneys, and the documents provided in SCE's April 29, 2015 Response establish that "*preventing, detecting, correcting, disclosing, and rectifying"* was not a consideration among the perpetrators.[77] A4NR has no illusion that a fine or penalty will "*achieve the objective of deterrence based on the utility's financial resources"* and believes that a ratemaking remedy, best determined when the Commission decides whether D.14-11-

[76] *Id.,* pp. 6 – 7.
[77] A4NR acknowledges that ex parte concerns were occasionally raised by subordinates (e.g., Laura Genao's email regarding the September 6, 2013 Litzinger-Starck-Peevey lunch meeting, as discussed in Section V. 3 above).

040 requires modification, is as indispensable a required deterrent as the Commission found it to be in D.14-11-041.[78]

D.14-11-041 applied the $50,000 maximum penalty authorized by Cal. Pub. Util. Code §2107 to each of 20 violations of Rule 8.3(f) and a single violation of Rule 1.1. A significant distinction between the circumstances underlying D.14-11-041 and those presented by SCE's violations in I.12-10-013 is the mitigating factor of PG&E's self-reporting:

> *These sanctions and remedies are rendered in response only to the self-reported violations that PG&E disclosed on September 15, 2014 and that were the subject of the October 7, 2014 hearing in this proceeding. This decision does not preclude Commission action on any other violations in this proceeding or other proceedings that may be discovered in the future.*[79]

Here, the only ex parte communication that SCE has *"self-reported"* is Mr. Pickett's combined oral and written communications with President Peevey in Poland on March 26, 2013. In light of the 684 days which elapsed before SCE's February 9, 2015 Late-Filed Notice, and the reasonable inference that no such reporting would have occurred but for the seizure of the written communication during the California Department of Justice's January 27, 2015 execution of its search warrant at President Peevey's home, no mitigating factor exists. Although the SCE April 29, 2015 Response's Appendix C generally describes at least 71 other ex

[78] As the Commission observed, *"Though the final amount of the ratemaking disallowance will be calculated at the time the total revenues for this proceeding are approved, the amount is likely to be significant enough to have a deterrent effect on similar behavior by PG&E in the future."* D.14-11-041, p. 16.
[79] *Id.,* p. 3.

parte communications "*in the interest of transparency*,"[80] SCE reiterates its belief that Commission Rules do not require these communications to be reported.[81]

Another significant distinction between the I.12-10-013 circumstances and those underlying D.14-11-041 is the ongoing damage to the other parties caused by SCE's non-reporting of the Poland communications, and its proper remedy as a continuing violation under Cal. Pub. Util. Code §2108. D.14-11-041's focus was on the violation of Rule 8.3(f)'s prohibition of ex parte communications regarding the assignment of a proceeding to a particular ALJ, or reassignment of a proceeding to another ALJ: *"Our findings herein only establish that PG&E's January emails violate the prohibition on ex parte contacts related to assignment of administrative law judges."*[82] Each email itself, not the delay in its eventual disclosure, was the actionable violation:

> *Though the effects of PG&E's violations were continuing until disclosed, the actual violations were not. This is analogous to an assault conviction; though the victim's suffering from injuries may continue for a period of time, there is still only one assault in violation of the law.*[83]

That is not the case with the non-disclosure of Mr. Pickett's oral and written Poland communications, in violation of Rule 8.4. The offense was SCE's continuing unlawful retention of inside information, which greatly enhanced its settlement negotiating strategy. Rather than a single, isolable assault, SCE committed an ongoing embezzlement of information to which the other I.12-10-013 parties were entitled – and which they would have been reasonably likely to

[80] SCE April 29, 2015 Response, p. 2.
[81] *Id.*
[82] D.14-11-041, p. 28.
[83] *Id.,* pp. 28 – 29.

discover had SCE made timely proper reporting. Each day that the I.12-10-013 parties were kept in ignorance accrued to SCE's strategic advantage, as the Commission's investigation proceeded, settlement negotiations took place, a fraudulently induced agreement was approved, and legal deadlines for rehearing or modification ran. A4NR's PFM elaborates on the different steps, month by month, it would have taken in I.12-10-013 had it received the information to which it was legally entitled.[84] It is reasonable to assume that other I.12-10-013 parties could assemble comparable lists of their own. SCE's sustained refusal to disclose the Poland communications was a continuing offense pursuant to Cal. Pub. Util. Code §2108.

While any ratemaking remedy should be deferred until the Commission determines whether the public interest requires modification of D.14-040-10, A4NR calculates the appropriate fine/penalty to be applied to SCE's violations as follows:

- **Failure to timely report Mr. Pickett's March 26, 2013 oral and written ex parte communications, in violation of Rule 8.4, for 681 days @ $50,000/day: $34,050,000.**
- **Failure to report 71 oral and written ex parte communications described in Appendix C of SCE's April 29, 2015 Response, in violation of Rule 8.4, @ $50,000 per communication: $3,550,000. This amount may increase, pending clarification of the unreported communications discussed in Section IV above.**
- **Mr. Litzinger's May 14, 2014 knowingly false testimony, in violation of Cal. Pub. Util. Code §2114: $500,000.**
- **Rule 1.1 violation associated with violations of Rule 8.4: $50,000.**

[84] A4NR PFM, pp. 3 – 6.

- **Rule 1.1 violation associated with violation of Cal. Pub. Util. Code §2114: $50,000.**
- **PRELIMINARY TOTAL: $38,200,000.**

Consistent with the restrictions imposed by D.14-11-041 on PG&E's ex parte communications, SCE should be prohibited for one year from ex parte contacts in all ratesetting proceedings except for procedural inquiries directed to ALJs. SCE should also be required during this period to report all contacts with the Commission staff senior management named in D.14-11-041 on the same three-day basis required by Commission Rules for ex parte contacts with decision makers.

IX. CONCLUSION.

For the reasons stated herein, A4NR respectfully requests a ruling from the Commission to:

1. Direct SCE to file with the Commission and serve on the parties a written explanation of the nexus between specific individuals from whom SCE received legal (as opposed to business, political, or public relations) advice and the privileges asserted to justify protection of Rpt#1, Rpt#2, Rpt#3, Rpt#7, Rpt#8, Rpt#9, Rpt#11, Rpt#26, and Rpt#48 as described in Appendix E to SCE's April 29, 2015 Response, as well as the redaction in the March 27, 2014 email from Ronald Litzinger to Liese Mosher contained in Appendix D at page SCE-CPUC-00000209.

2. Direct SCE to file with the Commission and serve on the parties a written declaration from each of the individuals identified in ¶¶ 1, 9, 10, and 11 of Appendix A to SCE's April 29, 2015 Response certifying that he/she has no personal knowledge of

any documents responsive to the April 14, 2015 Administrative Law Judges' Ruling other than those identified in SCE's April 29, 2015 Response.

3. Direct SCE to file with the Commission and serve on the parties a written explanation of why the communications discussed in Section IV of this Amended Motion for Sanctions were not included in Appendix C of SCE's April 29, 2015 Response.

4. Direct SCE to appear in the Commission Courtroom, State Office Building, 505 Van Ness Avenue, San Francisco, California, on _____, 2015 and show cause why it should not be held in contempt of the Commission and sanctioned for violating Rules 1.1 and 8.4. and Cal. Pub. Util. Code §2114. Such sanctions may include monetary penalties, restrictions on future ex parte communications, and other appropriate sanctions as may be identified at the hearing.

Respectfully submitted,

By: /s/ John L. Geesman

JOHN L. GEESMAN
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Date: May 6, 2015

Attorney for
ALLIANCE FOR NUCLEAR RESPONSIBILITY